



Early Journal Content on JSTOR, Free to Anyone in the World

This article is one of nearly 500,000 scholarly works digitized and made freely available to everyone in the world by JSTOR.

Known as the Early Journal Content, this set of works include research articles, news, letters, and other writings published in more than 200 of the oldest leading academic journals. The works date from the mid-seventeenth to the early twentieth centuries.

We encourage people to read and share the Early Journal Content openly and to tell others that this resource exists. People may post this content online or redistribute in any way for non-commercial purposes.

Read more about Early Journal Content at <http://about.jstor.org/participate-jstor/individuals/early-journal-content>.

JSTOR is a digital library of academic journals, books, and primary source objects. JSTOR helps people discover, use, and build upon a wide range of content through a powerful research and teaching platform, and preserves this content for future generations. JSTOR is part of ITHAKA, a not-for-profit organization that also includes Ithaka S+R and Portico. For more information about JSTOR, please contact support@jstor.org.

THE SUPREME COURT AND THE DEPENDENCIES.

BY GEORGE S. BOUTWELL, FORMERLY SECRETARY OF THE UNITED STATES TREASURY.

THE opinions given by the Justices of the Supreme Court of the United States, were given in the cases known under the general name of Insular Tariff Cases—the case of *De Lima & Co.* and the case of *Samuel B. Downes*, both against the collector of the port of New York. In each case, the opinion was given by Mr. Justice Brown, and in each case the decision was reached through a bare majority of the Court. In the case of *De Lima*, the final question in which the public is concerned was this: Was the Island of Porto Rico, after the treaty with Spain for the transfer of sovereignty had been ratified and exchanged, and the proclamation thereof made at Washington, a part of the territory of the United States and subject to the provision of the Constitution which declares that “all duties, imposts and excises shall be uniform throughout the United States.”

The ratification of the treaty was proclaimed at Washington the 11th day of April, 1899, and the articles which were the subject of controversy were imported in the autumn of that year. At that time, Congress had not acted in any manner in regard to the Island of Porto Rico. On the 12th day of April, 1900, an act known as the Foraker Act was passed, which provided a form of political organization for the government of the Island. Five justices, namely, Chief Justice Fuller, Justice Harlan, Justice Brewer, Justice Brown and Justice Peckham, concurred in the opinion that the goods so imported from Porto Rico into New York were entitled to admission free of duty. The decision is in these words:

“We are therefore of opinion that at the time these duties were levied, Porto Rico was not a foreign country, within the meaning of the tariff laws, but a Territory of the United States, that the duties

were illegally exacted, and that the plaintiffs are entitled to recover them back."

By the words of the decision, Porto Rico was declared to be a Territory of the United States; and from the decision itself it might be inferred that the uniformity clause of the Constitution applied to the Territory. This inference was controlled, however, by the opinion of Justice Brown in the Downes case. Inasmuch as there had been no attempt by Congress to legislate for Porto Rico, the authority of the Constitution in the Island, whatever it was, must have been due entirely to the innate force of the instrument, by which it operated upon a possession of the United States whenever the nature of that possession was such as to command the assent of other nations in conformity to the law of nations. Such must have been the opinion of the four judges who concurred with Justice Brown in the De Lima case. Four justices dissented from the conclusion reached by the majority of the Court. Mr. Justice Gray dissented on the ground that the decision was not reconcilable to the unanimous decision of the Court in the case of Fleming against Page, found in the ninth of Howard, page 603. Justices McKenna, Shiras and White dissented from the opinion of the Court, apparently upon the ground that, at that time, Porto Rico had not been organized as a Territory of the United States under the enabling act that had been passed by Congress.

In the dissenting opinion of the three judges last named, there is a distinct declaration that a duly organized Territory is within the embrace of the Constitution and under the uniformity clause of that instrument.

In the Downes case, Mr. Justice Brown assumed a position and announced a doctrine which is in opposition to the position of his four associates in the De Lima case. The importation which was the subject of controversy in the Downes case, was made after the 12th of April, 1900, when the Foraker Act was passed. By that act, provision was made for a Territorial government in Porto Rico. A legislative body, consisting of two branches, was created, and authority was given for the appointment of a Governor and Attorney-General. Courts were to be created and authority was given to litigants for an appeal from the courts of Porto Rico to the Supreme Court of the United States. By the same act a duty was levied upon the

products of Porto Rico that might be brought into the United States. The question was as to the validity of the duty so imposed. In this case, Mr. Justice Brown, for himself alone, as appears from the record, assumed and maintained by argument the position that the Constitution of the United States was framed by the thirteen States, and that its scope and authority were limited to the thirteen States and to such States as from time to time might be added thereto; further than this, that the Constitution did not, by its own force, extend to the possessions of the United States, whether created into Territories with a regular form of government, or whether they were outlying, unorganized possessions. His position is easily understood. It is not without some support from the men who framed the Constitution. Its weakness is in the fact that the political history of the country and the records of the Supreme Court, with singular unanimity, maintain contrary doctrines, so far as this, assuredly—that the Territories, when organized, are, by the fact of organization, brought within the scope of the Constitution. These authorities assume that a Territorial organization constitutes a pledge to the inhabitants of a Territory that, under circumstances which in the nature of things are likely to arise, a Territory is to become a State in the Union. His opinion was not supported by the opinion of any other member of the Court. Three justices who concurred with him in the majority opinion in the *Downes* case, namely, Justice White, Justice Shiras and Justice McKenna, differed from him in regard to the scope of the Constitution, and maintained, as a doctrine, that, whenever a possession had been organized as a Territory, it became at once and thenceforth a part of the United States and subject to the jurisdiction of the Constitution, without any special declaration by Congress to that effect. Mr. Justice Gray concurred in the majority opinion, but without committing himself to the doctrine set up by Mr. Justice Brown. Four justices, Chief Justice Fuller, Justice Harlan, Justice Brewer and Justice Peckham, were of opinion that the Constitution applies to new possessions of the United States as soon as such possessions are transferred by treaty with the former sovereign, followed by the proclamation of the President that the treaty had been duly ratified.

Hence it follows, that seven of the Justices of the Supreme Court were of opinion that the Constitution became applicable

to a Territory whenever such Territory was duly organized, and four of the seven expressed the opinion that the Constitution applied to the possessions whenever acquired agreeably to the law of nations. It follows from these opinions, that the Court as a majority must hold, whenever the question is presented, that the uniformity clause of the Constitution, in regard to the levy of duties, excises and imposts, is applicable, not only to the States, but also to the Territories that may have been duly organized. The official action of the several justices warrants the conclusion that the four justices who concurred with Justice Brown in the opinion in the *Downes* case, were of the opinion that at the time the importation was made, which was the subject of controversy, the Island of Porto Rico had not been incorporated as a Territory agreeably to the usage of the country. On the other hand, the Chief Justice and the three justices concurring with him were of opinion that Porto Rico was, at the time of importation, a duly organized Territory of the United States, or otherwise that as a dependency the rules of uniformity applied to it. This difference of opinion must at some time disappear; and it may be assumed that, whenever the government that was authorized by the Foraker Act has been duly organized and set in motion, the difference of opinion in the Court, as far as seven justices are concerned, will have disappeared.

Upon this statement of the case the following conclusions may be deduced: As Justice Brown was of the opinion that Porto Rico, at the time of the importation of the articles in controversy in the *De Lima* case, was not foreign territory but a possession of the United States, and as he was also of the opinion that the Constitution of the United States did not apply to that Island and that Congress had not legislated concerning duties or imposts for the Island, he could only reach the conclusion that the duty which had been levied upon the *De Lima* importation had no authority either in the Constitution or in the laws of the United States, and therefore that the assessment made by the collector was unlawful. The four justices who concurred with him being of the opinion that the Constitution of the United States did apply to Porto Rico, were consequently of the opinion that the assessment of duties was illegal, inasmuch as under the Constitution the uniformity clause was applicable to trade between Porto Rico and New York. Hence, these five justices, al-

though entertaining different opinions as to the scope of the Constitution, were brought necessarily to the same conclusion upon the question which was at issue in the De Lima case, namely: "That, at the time these duties were levied, Porto Rico was not a foreign country within the meaning of the tariff laws, but a Territory of the United States, and that the duties were illegally exacted."

In the Downes case, Justice Brown expressed the opinion that the Constitution of the United States did not apply to any territory of the United States not included within the limits of a State. This opinion, whether sound or otherwise, is not, in any particular, in conflict with his holding in the De Lima case, but is entirely consistent with it. At the time of the importation which was in controversy in the Downes case, the act known as the Foraker Act had been passed, but the Territorial form of government for which provision had been made in that act had not been organized and put in operation. In that condition of affairs, it was entirely consistent for Justice Brown to hold, that the act imposing a duty of fifteen per cent. of the duties imposed under the Dingley Law was a legal proceeding on the part of the government of the United States, inasmuch as the territory of Porto Rico was no longer foreign territory, and inasmuch as it was not, in his opinion, within the scope of the Constitution. It followed necessarily that Congress could legislate, under its own discretion, for the tariff system of Porto Rico, assuming always, what is not by every one admitted, that Congress has power to legislate beyond the scope of the Constitution, from which its own authority to legislate is derived. Thus it appears that so far as the two cases are dealt with by Justice Brown, his action is consistent with his position that the Constitution of the United States does not extend beyond the States of the Union. His support in the Downes case is derived first from Justice White, Justice Shiras and Justice McKenna. The reasonable conclusion deducible from their concurring opinion is this, namely: the Constitution of the United States applies not only to the States, but also to such Territories as may have been created by act of Congress and duly organized. Following this opinion is the conclusion on their part, that at the time of the importation of the articles in controversy in the Downes case, Porto Rico had not been created a Territory and so organized

as to justify the opinion on their part that the Constitution extended to the Island. In that condition of opinion, they concur in the conclusion reached by Mr. Justice Brown, that the legislation in the Foraker Act, by which a duty was imposed on the products of Porto Rico was legal, inasmuch as the uniformity clause of the Constitution had no application to the Island. Therefore, and for the time being, the Foraker Act was within the scope of the authority of Congress. Of Mr. Justice Gray, it is to be said that his statement justifies the conclusion that, in his opinion, Porto Rico was in a transition period, and that during that period Congress had power to legislate.

Having in mind these opinions, certain views as to the future action of the Court may be deduced, namely: That the three justices who concurred with Justice Brown must reach the conclusion, at some time not far distant, if a case should arise, that Porto Rico is a Territory of the United States and subject to the Constitution of the United States. Justice Gray has not so committed himself but that he may concur with the three justices referred to. In this condition of opinion, it must happen that seven justices, and perhaps eight justices, will unite in the conclusion that the Territories of the United States, as they may from time to time be created by act of Congress and duly organized, are brought within the scope of the Constitution. Porto Rico is already an organized Territory or its organization as a Territory is soon to be completed. It must, therefore, be recognized by the Court, if a question should arise, as within the scope of the Constitution.

Not much time can elapse before a similar condition of things must exist in the Philippine Islands. A military government cannot be maintained for an indefinite period. It follows, therefore, that, very soon, every dependency which has come into the possession of the United States through the treaty with Spain, will be organized in a Territorial government, and, therefore, that, within the same period of time, the Constitution of the United States will be made applicable to each of them, through the expressed opinions of a large majority of the Justices of the Supreme Court. This being the case, the practical conclusion must be that which has been demanded by the Anti-imperialists of the country, namely: that the entire possessions of the United States that have been acquired in conformity to the law of

nations, will be under the jurisdiction of the Constitution, and that to them as to the States the clause which requires that "all duties, imposts and excises shall be uniform throughout the United States" will be applicable. Thus the demand of the Anti-imperialists will have been satisfied, though only through a process of delay. From the opinions of the different members of the Court, it may be inferred reasonably that they entertain the opinion, that the clause of the Constitution which provides that "the Congress shall have power to dispose of and to make all needful rules and regulations respecting the territory or other property belonging to the United States," is to be interpreted in its natural signification, and that the Territories of the United States may be disposed of at the will of Congress.

GEO. S. BOUTWELL.